E COPY

No. 81

In the Supreme Court of the United States

OCTOBER TERM, 1929

HENRY CHOTEAU, PETITIONER

v.

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Argument	5
Conclusion	9
Appendix	10

CITATIONS

Cases:

Choate v. *Trapp*, 224 U. S. 665 7

Elk v. *Wilkins*, 112 U. S. 94 7

Gillespie v. *Oklahoma*, 257 U. S. 501 8

Heiner v. *Colonial Trust Co.*, 275 U. S. 232 6

Levindale Lead Co. v. *Coleman*, 241 U. S. 432 6

Mixon v. *Littleton*, 265 Fed. 603 6

Statutes:

Act of June 28, 1906, c. 3572, 34 Stat. 539, 540, 543:

Sec. 2 10

Sec. 3 11

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1062, 1065:

Sec. 210 2

Sec. 211 (a) 2

Sec. 213 (a) 2

QUESTION PRESENTED

Whether the income of a member of the Osage Tribe of Indians, who has received a certificate of competency, is taxable under the provisions of the Revenue Act of 1918 when such income consists of the *pro rata* share of such Indian of the income of the Osage Tribe received during the years 1918, 1919, and 1920 from oil and gas mineral leases made by said tribe with the approval of the Secretary of the Interior under the Act of June 28, 1906, c. 3572, 34 Stat. 539.

STATUTES INVOLVED

The pertinent provisions of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1062, 1065, are as follows:

> SEC. 210. That * * * there shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax * * *.
>
> SEC. 211. (a) That * * * there shall be levied, collected, and paid for each taxable year upon the net income of every individual, a surtax * * *.
>
> SEC. 213. That for the purposes of this title * * * the term "gross income"—
>
> (a) Includes gains, profits, and income derived from * * * sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; * * * or gains or profits and income derived from any source whatever. * * *

The relevant provisions of the Act of June 28, 1906, c. 3572, 34 Stat. 539, will be found in the Appendix, pp. 10–12.

STATEMENT

The facts were submitted to the Board of Tax Appeals on stipulation (R. 8) in substance as follows:

The petitioner, Henry Chouteau, is a member of the Osage Tribe of Indians, duly enrolled and allotted as such under the Act of Congress of June 28, 1906, c. 3572, 34 Stat. 539, and has a certificate of competency as provided for in this Act of Congress. This certificate was issued on March 5, 1910. (R. 8.) The petitioner during the years 1918, 1919, and 1920 was also the owner of one-half share or allotment which he had received by inheritance from another member of the Osage Tribe of Indians, who was duly enrolled and allotted as such. Petitioner during the years 1918, 1919, and 1920 was, therefore, the owner of one and one-half shares or allotments, representing his own share or allotment and the one-half share or allotment which he had received by way of inheritance. (R. 8.)

During the year 1918 petitioner received as income from his own share or allotment as a member of the Osage Tribe of Indians, the sum of $3,940.00, and from the inherited one-half share or allotment that was owned by him the sum of $1,970.00. (R. 8.) During the year 1919 petitioner received as income from his own share or allotment as a member of the Osage Tribe of Indians, the sum of $4,980.00, and from the inherited one-half share or allotment that was owned by him the sum of $2,490.00. (R. 9.) During the year 1920 petitioner received as income

from his own share or allotment as a member of the Osage Tribe of Indians, the sum of $9,900.00, and from the inherited one-half share or allotment that was owned by him, the sum of $4,950.00. (R. 9.) The amounts received by the petitioner were paid to him through the Osage Indian Agency at Pawhuska, Oklahoma. (R. 9.)

All of the said income received by the petitioner during the years 1918, 1919, and 1920 was his *pro rata* part of the income of the Osage Tribe of Indians which was received during the said years from oil and gas mineral leases made by said tribe with the approval of the Secretary of the Interior under the Act of Congress of June 28, 1906. The oil and gas mineral leases were upon a part of the lands originally bought for the Osage Tribe of Indians by the United States with money belonging to said tribe and held in trust for said tribe by the United States, said lands having been purchased from the Cherokee Tribe of Indians and deeded to the United States, to be held in trust by it for the Osage Tribe of Indians. (R. 9.) These lands were purchased from the Cherokee Tribe of Indians with funds realized upon the sale of lands of the Osage Indians located in the State of Kansas. (R. 9.)

For the years 1918, 1919, and 1920, petitioner paid as income taxes $122.40, $57.55, and $551.21, respectively. (R. 8–9.) The Commissioner of Internal Revenue sent a deficiency letter finding deficiencies in income taxes against the petitioner for the years 1918, 1919, and 1920 in the respective

amounts of $40.64, $68.98, and $248.39. (R. 4–5.) Before the Board of Tax Appeals, the petitioner contended that all of the income received by him during the years 1918, 1919, and 1920 was exempt from tax and that, accordingly, he did not owe any deficiencies but was entitled to a refund of the amounts which he had theretofore paid. (R. 2–3.) The Board of Tax Appeals held that petitioner's income received during the years 1918, 1919, and 1920, was not exempt from tax and accordingly entered judgment for the respondent. (R. 10.) The Board's decision was affirmed by the Circuit Court of Appeals. (R. 32.)

ARGUMENT

The certificate of membership in the Osage Tribe of Indians, issued to the petitioner on March 5, 1910, under the provisions of the Act of June 28, 1906, *supra*, provided in effect that since petitioner had been found "fully competent and capable of transacting his own business and caring for his own individual affairs," he was thereby invested "with full power and authority to sell and convey any or all surplus lands deeded him * * * except the minerals therein," which were reserved for the use of the tribe for twenty-five years from April 8, 1906. (R. 16, 31.)

Except for minerals reserved to the tribe, and his homestead allotment (made inalienable and nontaxable for twenty-five years by Section 2, subsection Seventh, of the Act of June 28, 1906, *supra*; see *infra*, pp. 10–11), petitioner was fully competent to sell or

otherwise to deal with the lands or other interests owned by him. While petitioner had no legal title to the minerals in such lands, and received his *pro rata* share in royalties and bonuses from mineral leases under the provisions of the Act of June 28, 1906, *supra*, he nevertheless had the right to sell or otherwise to deal with his equitable or undivided interest in such minerals and in the mineral leases from which the bonuses and royalties were derived. It has been held that white persons inheriting shares or allotments from Indians have the right to convey such equitable or undivided interests. *Levindale Lead Co. v. Coleman*, 241 U. S. 432, 440; *Mixon* v. *Littleton*, 265 Fed. 603 (C. C. A. 8th). The right of the competent Indian to dispose of his property or interests does not differ from that of the white heir.

Under the foregoing circumstances, the Circuit Court of Appeals held that the petitioner was fully emancipated by the certificate of competency except as to his homestead. The certificate was obtained at his request with the Government's consent. Thereafter, the rents and royalties from his undivided interests were not paid to him as a dependent ward.

Sections 210 and 211 of the Revenue Act of 1918, *supra*, impose an income tax upon the net income of "every individual." Section 213(a) of the same Act provides that "income derived from any source whatever" shall be included in gross income. Congress undoubtedly had the power to tax petitioner's income (*Heiner* v. *Colonial Trust Co.*, 275 U. S. 232,

234–235), and the foregoing provisions of the Revenue Act of 1918 are clearly broad enough to include that income in the absence of some special rule of statutory construction to the contrary.

The rule that general Acts of Congress do not include Indians unless the intention to include them is clearly expressed would appear inapplicable where the Indian has been emancipated by a certificate of competency. The principle upon which the rule is based is explained in *Choate* v. *Trapp*, 224 U. S. 665, as follows (p. 675):

> But in the Government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years and has been applied in tax cases.

See also *Elk* v. *Wilkins*, 112 U. S. 94.

But in the present case the petitioner is no longer a defenseless ward of the Government. With his emancipation, voluntarily sought, the reason for any distinction in his favor ceased. Legislation with general application thenceforth includes him.

In this connection the provisions of the Act of June 28, 1906, *supra*, are significant. Section 2, sub-

section Seventh, of that Act (p. 11, *infra*) provides in part:

> * * * upon the issuance of such certificate of competency the lands of such member (except his or her homestead) shall become subject to taxation, * * *

The homestead is exempt from taxation under the express wording of the statute. Other lands are expressly subjected to taxation. There are no other express provisions of the statute relating to taxation or exemption from taxation of property or interests of competent Indians.

It seems clear from the foregoing that had Congress intended to exempt the income of competent Indians from the operation of the income tax laws, such intention would have been expressed when those laws were enacted. No exemption should be inferred or implied when the basic reason for such an implication no longer exists.

Taxation of petitioner's income can have no economic effect upon the tribe or the rights of incompetent Indians. No tax on income is assessed to the tribe itself, and no liability of the tribe is asserted. The burden rests solely upon the individual recipient of the income. The tax does not apply until the income reaches the individual and the shares of incompetent Indians exempt from the tax are not in any way reduced by taxation of the competent Indians. *Gillespie* v. *Oklahoma*, 257 U. S. 501, relied

upon by the petitioner, relates to taxes by the States; as already set out, the power of the United States to tax the income is clear. *Heiner* v. *Colonial Trust Co.*, *supra*. It would seem that there is no reason to extend to the competent Indian exemptions and privileges now enjoyed by the dependent, restricted wards of the Government who have not received a certificate of competency. "Tax exemptions are never lightly to be inferred." *Heiner* v. *Colonial Trust Co.*, *supra*, at 235.

CONCLUSION

While the case is an important one, it is submitted that the basic reasoning and conclusion of the Circuit Court of Appeals is correct. There is no conflict of authority. It is respectfully submitted, therefore, that the petition should be denied.

THOMAS D. THACHER,
Solicitor General.
G. A. YOUNGQUIST,
Assistant Attorney General.
CLAUDE R. BRANCH,
SEWALL KEY,
MORTON POE FISHER,
Special Assistants to the Attorney General.
ERWIN N. GRISWOLD,
Attorney.

MAY, 1930.

Act of June 28, 1906, c. 3572, 34 Stat. 539, 540, 541, 542, 543, 544:

SEC. 2. That all lands belonging to the Osage tribe of Indians in Oklahoma Territory, except as herein provided, shall be divided among the members of said tribe, giving to each his or her fair share thereof in acres, as follows:

* * * * *

Fourth. * * * Each member of said tribe shall be permitted to designate which of his three selections shall be a homestead, and his certificate of allotment and deed shall designate the same as a homestead, and the same shall be inalienable and nontaxable until otherwise provided by Act of Congress. The other two selections of each member, together with his share of the remaining lands allotted to the member, shall be known as surplus land, and shall be inalienable for twenty-five years, except as hereinafter provided.

* * * * *

Seventh. That the Secretary of the Interior, in his discretion, at the request and upon the petition of any adult member of the tribe, may issue to such member a certificate of competency, authorizing him to sell and convey any of the lands deeded him by reason of this Act, except his homestead, which shall remain inalienable and nontaxable for a period of twenty-five years, or during the life of the homestead allottee, if upon investigation,

consideration, and examination of the request he shall find any such member fully competent and capable of transacting his or her own business and caring for his or her own individual affairs: *Provided*, That upon the issuance of such certificate of competency the lands of such member (except his or her homestead) shall become subject to taxation, and such member, except as herein provided, shall have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States: *Provided*, That the surplus lands shall be nontaxable for the period of three years from the approval of this Act, except where certificates of competency are issued or in case of the death of the allottee, unless otherwise provided by Congress: *And provided further*, That nothing herein shall authorize the sale of the oil, gas, coal, or other minerals covered by said lands, said minerals being reserved to the use of the tribe for a period of twenty-five years, and the royalty to be paid to said tribe as hereinafter provided: *And provided further*, That the oil, gas, coal, and other minerals upon said allotted lands shall become the property of the individual owner of said land at the expiration of said twenty-five years, unless otherwise provided for by Act of Congress.

SEC. 3. That the oil, gas, coal, or other minerals covered by the lands for the selection and division of which provision is herein made are hereby reserved to the Osage tribe for a period of twenty-five years from and after the eighth day of April, nineteen hundred

and six; and leases for all oil, gas, and other minerals, covered by selections and division of land herein provided for, may be made by the Osage tribe of Indians through its tribal council, and with the approval of the Secretary of the Interior, and under such rules and regulations as he may prescribe: *Provided*, That the royalties to be paid to the Osage tribe under any mineral lease so made shall be determined by the President of the United States: *And provided further*, That no mining of or prospecting for any of said mineral or minerals shall be permitted on the homestead selections herein provided for without the written consent of the Secretary of the Interior: *Provided, however*, That nothing herein contained shall be construed as affecting any valid existing lease or contract.

U. S. GOVERNMENT PRINTING OFFICE: 1930